(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Adcom Wire, d/b/a Adcom Wire Company	)	RCRA Appeal No. 92-2
Permittee	)	

[Decided February 4, 1994]

ORDER ON RECONSIDERATION

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

ADCOM WIRE, D/B/A ADCOM WIRE COMPANY

RCRA Appeal No. 92-2

ORDER ON RECONSIDERATION

Decided February 4, 1994

Syllabus

Adcom Wire Company sought reconsideration of the Environmental Appeals Board's decision denying review of the federal portion of a RCRA permit issued by EPA Region IV for Adcom's wire manufacturing facility in Jacksonville, Florida. More specifically, Adcom sought reconsideration of the Board's decision that (1) the Region did not clearly err in concluding that Adcom treated, stored, or disposed of hazardous waste after November 19, 1980 and (2) the status of the State portion of Adcom's RCRA permit was not relevant to EPA's authority to issue the federal portion.

Held: First, the Region erred in relying upon the State of Florida's determination of RCRA jurisdiction in this case. Where, as here, a permittee has contested the exercise of RCRA jurisdiction in the State proceeding and then offers evidence in its comments in the federal permit proceeding to show that the State determination may have erroneous, the Region may not infer jurisdiction based on the State's action. Rather, the Region must make its own determination that it has jurisdiction to act under 40 C.F.R. Part 264. Second, the Board reaffirms its holding that expiration of the State portion of a RCRA permit does not affect the permittee's federal RCRA obligations. The permittee's federal RCRA obligations under HSWA are triggered when a RCRA permit is required and do not expire until the federal requirements have been completed.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

Before us now is a motion for reconsideration filed by Adcom Wire Company, the Petitioner in this appeal of the corrective action portion of a permit issued under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C §6901, *et seq*. The permit was issued by EPA Region IV for Adcom's wire manufacturing facility in Jacksonville, Florida. In its petition for review of the permit, Adcom argued *inter alia* that Region IV did not have the authority to issue the federal portion of the permit because: (1) Adcom did not treat, store, or dispose of hazardous waste after November 19, 1980, when the applicable RCRA regulations became effective, and (2) the underlying state-issued portion of the permit had expired. On September 3, 1992, the Environmental Appeals Board denied review of Adcom's permit. The Board held that (1) the Region was not clearly erroneous in its determination that Adcom was subject to RCRA jurisdiction and (2) that issues relating to the State portion of Adcom's RCRA permit were not properly before the Board or relevant to the validity of the Region's action.

Adcom filed a timely motion for reconsideration on the two above-noted issues. The Board granted Adcom's motion for reconsideration and designated certain issues for further briefing and oral argument. Briefs were received from the parties and oral argument was heard. This matter is now ready for decision.

I. *BACKGROUND*

As noted above, at issue in this appeal is the federal portion of a split EPA-State RCRA permit. The State portion of the RCRA permit is a closure permit which was issued to Adcom under Florida's hazardous waste law, Chapter 403.722, Florida Statutes. EPA had earlier authorized the State of Florida to operate the RCRA program in lieu of the federal program, in accordance with RCRA §3006, 42 U.S.C. §6926. Pursuant to that authority, Florida determined that Adcom was subject to RCRA because it had stored a hazardous waste, spent pickle liquor, in a rubber lined surface impoundment, on or after November 19, 1980. *See* Exhibit 2 to Adcom's Motion for Reconsideration (Letter dated January 7, 1991, from Jimmy F. Kirkland to James H. Scarbrough). On September 12, 1988, Florida issued a RCRA closure permit to Adcom. The permit was set to expire on November 11, 1991. On August 21, 1991, Adcom sought to renew the closure permit. [1]

The federal portion of Adcom's permit, containing corrective action requirements, was issued to Adcom under the Hazardous and Solid Waste Amendments of 1984, (HSWA), 42 U.S.C §6926. [2] Florida has not been authorized by EPA to assume responsibility for the corrective action program under

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[1] Adcom now argues that its renewal application, which was filed under protest, was defective and therefore it did not serve to extend the closure permit.

[2] States that had authorized RCRA programs before the 1984 amendments did not automatically become authorized to issue permits implementing the requirements of the 1984 amendments.

HSWA.[3] Therefore it was Region IV's responsibility to issue the HSWA portion of the permit to Adcom.

Pursuant to its HSWA authority, Region IV issued a draft HSWA permit to Adcom on July 11, 1991. The draft permit identified Adcom's corrective action responsibilities. In its comments on the draft permit, Adcom argued that the Region did not have jurisdiction to issue the HSWA portion of the permit because, contrary to the State's assertions, Adcom never treated, stored, or disposed of spent pickle liquor, a listed hazardous waste, on or after November 19, 1980, the effective date of the applicable RCRA regulations. In its response to comments, Region IV did not refute Adcom's factual contentions; rather the Region stated that issuance of the State portion of the RCRA permit provided sufficient authority for the Region to issue the HSWA portion of the permit:

> Since Adcom currently is operating under [a] RCRA Closure Permit issued by the FDER [Florida Department of Environmental Regulation], EPA has the authority and the

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[3] RCRA §3006(g)(1), 42 U.S.C. §6926(g)(1) provides that:

> Any requirement or prohibition which is applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste and which is imposed under this subchapter pursuant to the amendments made by the Hazardous and Solid Waste Amendments of 1984 shall take effect in each State having an interim or finally authorized State program on the same date as such requirement takes effect in other States. *The administrator shall carry out such requirement directly in each such State unless the State program is finally authorized (or is granted interim authorization as provided in paragraph (2) with respect to such requirement)*.

(Emphasis added.) RCRA §3006(g)(1) is implemented in the regulations at 40 CFR §271.3(a)(3) as follows:

> Until an authorized State program is revised to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program revisions receive final or interim authorization pursuant to section 3006(g)(2) of RCRA, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984.

Similarly, 40 CFR §271.134(f) provides that:

> Notwithstanding the above provisions, EPA shall issue permits, or portions of permits to facilities in authorized States as necessary to implement the Hazardous and Solid Waste Amendments of 1984.

> statutory mandate * * * to add corrective action requirements to address all releases. EPA has the authority regardless of whether Adcom is disputing the applicability of RCRA to the facility, so long as the base portion of the RCRA permit is not withdrawn.

Exhibit 13, Response to Adcom's Brief on Reconsideration (EPA Response to Comments). Region IV issued a final corrective action permit to Adcom on November 27, 1991.

Adcom appealed the Region's permit decision to this Board, repeating its contention that the Region lacked the statutory authority to issue the HSWA portion of the permit because Adcom never treated, stored or disposed of any hazardous waste on or after November 19, 1980. Adcom also argued that the Region lacked the authority to issue the HSWA permit because the State-issued non-HSWA portion of the permit had expired before the HSWA portion was issued and Adcom's renewal application was defective and, therefore, did not serve to extend the State permit. Adcom argued that the federal corrective action portion of a RCRA permit must be tied to a valid state RCRA permit.

In its response to Adcom's appeal, the Region did not explicitly rely on the Florida closure permit as the basis for its assertion of jurisdiction, as it had done in its response to comments. Rather, the Region argued that regardless of whether Adcom stored spent pickle liquor, a listed hazardous waste, in the rubber-lined surface impoundment, Adcom had stored rinse water, a characteristic hazardous waste, in the rubber-lined surface impoundment and, therefore, Adcom was properly subject to RCRA's requirements. Region's Response to Petition, at 7-17. This Board was persuaded by the Region's arguments, and upheld the Region's exercise of its HSWA jurisdiction. The Board also held that the alleged defects in Adcom's State-permit renewal application, or expiration of the State-issued non-HSWA portion of the permit were not relevant to the validity of the HSWA portion of Adcom's permit.

Adcom filed a motion for reconsideration, informing the Board that while it may not have been clear from the briefs, the rinse water rationale relied on by the Region had been advanced for the first time in the Region's response to Adcom's appeal. Adcom argued that it had never had a chance to present its views as to the validity of the rinse water rationale and that due process demanded that Adcom be given the opportunity to refute the Region's determination. Adcom also urged the Board to reconsider its holding that the HSWA portion of the permit is wholly independent of the State-issued non-HSWA portion of the permit.

In its brief opposing Adcom's Motion for Reconsideration the Region argued that Adcom did not need an opportunity to respond to the Region's rinse water rationale, because the Region was still basing its jurisdiction to issue the HSWA portion of the permit on the State's decision to issue the non-HSWA portion of the permit. The Region further argued that Adcom could not challenge the State's assertion of RCRA jurisdiction in this federal HSWA permit proceeding.

II. *DISCUSSION*

A. *RCRA Jurisdiction*

The principal issue on reconsideration is whether Adcom may, under the facts presented here, challenge the Region's statutory authority or jurisdiction to issue the HSWA portion of a split EPA-State RCRA permit. For the reasons set forth below, we believe that Adcom's jurisdictional challenge is proper and that this permit must be remanded for a new determination on jurisdiction.

Our analysis begins with the federal RCRA regulations, in this case 40 CFR Part 264, which contains the corrective action rule. Under Section 264.1, the requirements of Part 264 only apply to facilities that treated, stored, or disposed of hazardous waste on or after November 19, 1980 (the date the provisions of Part 264 became effective). Thus, a Region may only issue the HSWA portion of the permit if Part 264 applies, and Part 264 applies only where a facility treated, stored, or disposed of hazardous waste within the meaning of Section 264.1, on or after November 19, 1980. Because the jurisdictional determination for the HSWA portion of the permit requires application of a federal regulation (i.e., Section 264.1), we are not persuaded by the Region's contention that EPA is bound by the State's jurisdictional determination. An authorized State does not have authority to apply and interpret federal RCRA regulations. When an authorized State receives authority to run its own RCRA program in lieu of the federal program, it only receives authority to apply and enforce its own State regulations. *Cf. United States Department of Energy v. Ohio*, 112 S.Ct. 1627, 1638 (1992)("penalties prescribed by state statutes approved by EPA and supplanting the CWA" did not "arise under federal law" and thus could not be enforced under 33 U.S.C. §1319). Only the Region can make the jurisdictional determination under the federal regulations. Accordingly, a permittee may challenge RCRA jurisdiction in a federal HSWA

proceeding, provided the challenge is properly presented. We turn now to whether Adcom's jurisdictional challenge may be heard in this case. [4]

We conclude that Adcom's jurisdictional objection may be considered because, under the facts of this case, the Region was not free to simply rely upon the State's jurisdiction determination as its own. In particular, Adcom consistently asserted both before the State and the Region that it did not treat, store, or dispose of any hazardous waste after November 19, 1980. In addition, Adcom presented the Region with credible evidence to show that the State's decision on jurisdiction was questionable. In these circumstances, it was not appropriate for the Region simply to infer that it had jurisdiction based on the State's action. Rather, the Region should have made its own jurisdictional determination as it appeared to have done on the basis of the rinse water rationale in its brief on appeal.

Our decision to require a Region to make its own determination of jurisdiction in the above-described circumstance should not be construed as imposing new requirements on Regional RCRA permit writers. To the contrary, we would expect that the Regions would continue to base their exercise of HSWA jurisdiction upon the State's decision to require a RCRA permit in almost every case. Certainly, where a permittee does not contest RCRA jurisdiction at the State level and does not contest it at the federal level, the Region may rely on the State's jurisdictional determination. In such circumstances, the fact that the permittee did not contest RCRA jurisdiction at the State level gives rise to an inference that the permittee did in fact treat, store, or dispose of hazardous waste on or after November 19, 1980, and the Region need not make an independent determination. In addition, even if a permit applicant at one time challenged the assertion of RCRA jurisdiction before the State, but does not raise any objection to the exercise of federal HSWA jurisdiction, the Region may properly infer that the permittee has

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[4] In support of its contention that RCRA jurisdiction is properly decided by the State in a split EPA-State RCRA permit situation, the Region relies on a line of administrative and judicial cases holding that the Agency may not consider challenges to the validity of the State-issued portion of a permit. *See, e.g., In re Conoco, Inc.*, RCRA Appeal No. 88-44 (Adm's, Dec. 12, 1991) (at page 2, footnote 1 and cases cited therein). The Region's reliance on these cases misses the mark. Although the Agency does not have authority to entertain challenges to the State-issued, non-HSWA portion of the permit either before the Region or on an appeal of the HSWA portion of the permit, the Agency does have authority to entertain challenges to the jurisdictional determination underlying the federally-issued, HSWA portion of the permit, where the issue has been properly presented to the Region and preserved for the Board's review.

agreed to EPA's exercise of RCRA jurisdiction. [5] However, in the rare case, as we have here, where a permittee contested or is contesting the exercise of RCRA jurisdiction in the State permit proceeding and then offers evidence in its comments on the draft HSWA portion of the RCRA permit to show that the State's jurisdiction determination may be erroneous, the Region may not simply infer jurisdiction based on the State's assertion of RCRA jurisdiction. Rather, the Region must assure itself that it has jurisdiction under Part 264. As such, the Region must make an independent determination as to whether the facility treated, stored, or disposed of hazardous waste on or after November 19, 1980. Further, if the Region determines that RCRA jurisdiction does exist, it must explain the basis for its determination in its response to comments. Finally, if the Region determines that jurisdiction is proper on a factual basis different from that relied upon by the State, the Region must allow the permittee an opportunity to comment on the Region's jurisdiction determination.

In view of the foregoing we conclude that Adcom's HSWA permit must be remanded for a Regional decision on jurisdiction. If the Region concludes that it has HSWA jurisdiction it must reopen the record for comment on its jurisdictional determination. If the Region concludes that it does not have jurisdiction the permit must be withdrawn.

B. *The Effect of the State Permit*

For the reasons set forth below, the Board finds no basis for changing its original decision with regard to defects in or expiration of Adcom's Florida RCRA permit. [6] Adcom continues to argue that, regardless of whether the Region finds that it has HSWA jurisdiction, the Region has no authority to issue a HSWA permit because there is no longer a valid State non-HSWA portion of the permit. First, Adcom asserts that because the State-issued portion of the permit expired before the Region issued the HSWA portion of the permit, the Region lacked statutory authority to issue the HSWA portion of the permit. Adcom further argues in the same vein that because its application for renewal of the State-issued portion of its

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[5] This case does not raise the issue of whether a Region must make an independent RCRA jurisdictional determination where the objection was not raised before the State but is raised for the first time in the HSWA permit proceeding. In these cases, we see no reason why the Region cannot, following a review of the State's jurisdictional determination, adopt the State's analysis as its own. However, if the permittee presents some new information that places the State decision in doubt or shows why it may not be determinative of Federal jurisdiction, the Region will have to satisfy itself that it still has HSWA jurisdiction.

[6] In our initial decision, the Board held that a valid EPA-issued HSWA permit stands on its own regardless of whether the State non-HSWA permit issued under state law has expired.

permit (filed under protest) was defective, the renewal application did not serve to extend Adcom's State-RCRA permit and thus the Region lost its authority to issue the HSWA permit. [7]

By these arguments Adcom seeks to persuade us that EPA's authority to issue the corrective action portion of a RCRA permit depends on the continuing existence of the State-issued portion of the permit. Contrary to Adcom's assertions, however, we can find nothing in the federal statute or regulations to suggest that the corrective action obligation expires when the need for the State-issued portion no longer exists. [8] Assuming that RCRA jurisdiction otherwise exists, the statute and the regulation plainly contemplate that the corrective action obligation attaches whenever a person required to seek a RCRA permit, seeks a permit, as set forth in 40 CFR §264.101. Here, Adcom clearly sought a RCRA permit (albeit under protest). Thus, assuming the Region concludes that it has HSWA jurisdiction,

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[7] Under Florida law, the "timely and sufficient" filing of an application for renewal of a permit will cause the permit to remain in effect after its expiration date "until the renewal application has been finally acted upon." Fla. Admin. Code Ann. r. 17-4.090 (quoted in Adcom's Supplement and Correction to Adcom Wire Company's Brief on Reconsideration). *Id.* Adcom argues that because its renewal application was defective in certain respects, it was not "sufficient" within the meaning of the Florida regulation, and that accordingly, the filing of the application for renewal did *not* cause the State-issued portion of the permit to remain in effect. Adcom argues that without a valid renewal application to keep Adcom's permit in effect, the Region lacks the statutory authority to issue a HSWA permit.

[8] Section 3004(u) of RCRA, the corrective action provision, states:

> Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit. Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

The corrective action regulation, 40 CFR §264.101, states:

> (a) The owner or operator of a facility seeking a permit for the treatment, storage or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit.
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> (b) Corrective action will be specified in the permit. The permit will contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) the obligation to perform corrective action.

Adcom is obligated to perform corrective action. It is therefore not necessary for the Board to reach Adcom's arguments concerning the effect of its State-permit renewal application. EPA's authority to issue a corrective action permit does not turn on the continuing effectiveness of Adcom's State-RCRA permit.

Indeed, Adcom's contention that a corrective action permit must be tied to a continuing State-RCRA permit runs directly contrary to the corrective action program. We can easily envision circumstances where the corrective action portion of a permit will continue long after the non-HSWA portion of the permit has expired. For example, long term pump and treat remedies under the HSWA portion of the permit may continue long after closure and post closure responsibilities under the non-HSWA portion have ceased. Thus, we conclude that under §3004(u) Adcom's HSWA obligations were triggered once a RCRA permit was required and that the HSWA obligations do not expire until completed. We therefore reaffirm our earlier decision that the expiration of the State-issued portion of the permit did not strip the Region of its statutory authority to issue the HSWA portion of the permit.

III. *CONCLUSION*

For all the foregoing reasons, we reject Adcom's arguments with respect to defects in or the expiration of the State-issued portion of the permit. However, we conclude that under the specific facts of this case, the Region is required to respond to Adcom's objections to the Region's assertion of HSWA jurisdiction and to make its own jurisdictional determination with respect to the HSWA portion of the permit. Accordingly, as explained above, we are remanding this permit to the Region so that it can make a HSWA jurisdictional determination and then reopen the public comment period. In the event the Region concludes that it does not have jurisdiction it shall withdraw the permit.

So ordered.